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# SUPREME COURT OF THE UNITED STATES.

No. ~~106.~~ 15.

## LESSEE OF SAMUEL SMITH, PLAINTIFF IN ERROR,

VERSUS

## ROBERT TRABUE'S HEIRS, BY JAMES TRABUE THEIR NEXT FRIEND.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE DISTRICT OF KENTUCKY.

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THE UNITED STATES OF AMERICA, sct.

*The President of the United States to the Judges of the seventh circuit court of the United States, holden in and for the Kentucky district, greeting:*

Because in the record and proceedings, and also in rendering a judgment in a motion before them, between James Trabue, Daniel Trabue, Edward Trabue, Juliann Trabue, William Trabue, Robert Trabue, Lavine Trabue, and Charles Trabue, infants of Robert Trabue, under the age of twenty-one years, by James Trabue, their next friend, plaintiffs, and John Doe on the demise of Samuel Smith, defendant, in a motion for restitution, manifest error hath intervened, to the great damage of the said Samuel Smith, as in his complaint hath been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done the parties aforesaid in this behalf:

You are hereby commanded, if a judgment be given, then under your seal, you distinctly and openly send the record and proceedings in the suit afore-

said, with all things concerning them and this writ, so that you have the same before the chief justice and associate justices of the Supreme Court of the United States, on the second Monday in January next, at the city of Washington, the present seat of the National Government, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon what of right ought to be done. Witness, the honorable John Marshall, Chief Justice of the said Supreme Court, at the city of Washington, this 19th day of May, A. D. 1831, and in the 55th year of our independence.

Attest: JNO. H. HANNA, *C. C. C. K. D.*

Allowed by

JOHN McLEAN,
*Just. Sup. Court U. States.*

*To James Trabue, Daniel Trabue, Edward Trabue, Juliann Trabue, William Trabue, Robert Trabue, Lavine Trabue, and Charles Trabue, infants of Robert Trabue, under the age of twenty-one years, by James Trabue their next friend.*

Whereas a writ of error hath been issued by the clerk of the seventh circuit court of the United States of America, in and for the Kentucky district, on behalf of Samuel Smith, returnable to the Supreme Court of the United States on the second Monday in January next, in a motion for restitution, wherein the said James Trabue, &c. are plaintiffs, and Samuel Smith is defendant.

These are therefore to cite and command you, that you be and appear in the Supreme Court of the United States at the city of Washington, on the day aforesaid, then and there to hear the errors assigned for the reversal of the said writ of error.

Witness my hand as an associate justice of the Supreme Court of the Supreme Court of the United States, this 19th day of May, A. D. 1831, and in the 55th year of the independence of the United States.

JOHN McLEAN.

Executed 29 June, 1831.

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| Service on 9 def'ts, - - - - - - | 18 00 |
| 40 miles, - - - - - - - - | 2 00 |
| | $20 00 |

A. B. MORTON, *D. M. K. D.*

UNITED STATES OF AMERICA, *seventh circuit court, Kentucky district, sct.*

JAMES TRABUE, &c., heirs of Robert Trabue, plaintiffs, *against* SAMUEL SMITH, defendant. } *On motion for restitution.*

Pleas before the Honorable John McLean and John Boyle, judges of the seventh circuit court of the United States of America, in and for the district of Kentucky, held at the capitol, in the town of Frankfort, at the May term of said court, in the year of our Lord 1831.

Be it remembered, that heretofore, to wit, on the day of May, in the year 1830, came the plaintiffs aforesaid, by their attorney, and filed the following petition against the said defendant Samuel Smith, to wit:

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*To the Honorable Judges of the circuit court of the United States, 7th circuit, Kentucky district:*

Your petitioners James Trabue, Daniel Trabue, Edward Trabue, Juliann Trabue, William Trabue, Robert Trabue, Lavine Trabue, and Charles Trabue, infants of Robert Trabue, under the age of twenty one, by James Trabue, their next friend, respectfully represent, that John Doe, on the demise of Samuel Smith, instituted his action of ejectment in this honorable court against Richard Fenn, with a notice to Hiram Bryant and William Bryant, and others. Your petitioners respectfully represent, that said Bryants were tenants to your petitioners' ancestor, Robert Trabue, who appeared and had his tenants entered defendants, and a judgment was rendered against them at the May term, 1818. Your petitioners will further state, no writ of habere facias possessionem never issued on the said judgment aforesaid; that, at the November term, 1818, a judgment was rendered against the other tenants, and on that judgment a writ of habere facias possessionem issued, and the marshal of the district of Kentucky, under said last judgment and writ, turned out of possession John Evans, who was a tenant of your petitioners, resident on the same place occupied by said Bryants when the said suit was brought as aforesaid and judgment rendered, and possessed himself. Your petitioners, therefore, pray your honors to award a rule against said Samuel Smith, to show cause why a writ of restitution shall not issue to restore your petitioners to their possession of said premises.

DENNY & TRIPLETT,
*Atto's for Trabue.*

And afterwards, to wit, at the May term of the court aforesaid, in the year 1830, on motion of the plaintiffs herein, by their attorney, a rule is awarded them against the defendant, to shew cause on or before the 6th day of the next term, why a writ of restitution should not be awarded them to restore the possession of the tenements taken out of the possession of James McGuire, William Acres and John Evans, by the marshal, upon a writ of habere facias possessionem, in the name of Doe on dem. Smith *vs.* Brinegar, &c.

On the back of a copy of the foregoing rule, the marshal made the following return, to wit:

Executed July 8th, 1830.

JNO. M. McCALLA, *M. K. D.*

And afterwards, to wit, at the November term of the court aforesaid, in the year 1830, (until which time this motion was continued,) on motion of the plaintiffs, leave is given them to take depositions in this motion, by giving to the adverse party legal notice of the time and place of taking the same.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1831, (until which time this rule was continued,) the following order was made between the parties herein, to wit:

SAMUEL SMITH, plaintiff,
*against*
JAMES TRABUE, &c., defendants. } *On motion to quash marshal's return.*

On motion of the plaintiff, by his attorney, a rule is awarded him against the defendants, returnable here on , to show cause why

the marshal's return made upon a copy of the rule in favor of the defendants against the said Smith, should not be quashed, for the reasons filed by the said plaintiff.

Which reasons are as follow, to wit:

S. SMITH, *ads.* TRABUE, &c.

The defendant moves the court to quash the marshal's return herein, of executed, because the marshal's return is untrue in point of fact, he having never served the process or rule upon the defendant, as he has returned; the defendant being at the time of the issuing of the rule, and ever since, a citizen of Maryland, residing in the city of Baltimore in said State, and never was in all his life, the more especially since the issuing, within the State of Kentucky.

WICKLIFFE & WOOLLEY.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the May term, 1831, John M. McCalla, marshal of the district of Kentucky, asked leave of the court to amend the return made by him, on the service of the rule in this motion, by stating that he had delivered a copy to Robert Wickliffe, Esq., attorney for the defendant, by order of Tho. Triplett, Trabue's counsel, which was granted him, and the amendment made accordingly.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the May term in the year 1831, on the 18th day of May, the court being now sufficiently advised, do consider that a writ of restitution be awarded the plaintiffs in this motion, to restore them to the possession of the land from which their tenants were removed by the marshal, under and by virtue of a writ of habere facias possessionem, in the name of Doe dem. Samuel Smith against Brinegar and others; and that the plaintiffs recover of the said defendant Smith their costs herein expended.

On the trial of this motion, the following bill of exceptions was tendered to the court, and ordered to be recorded, to wit:

"In this cause the plaintiffs in the motion read the following rule, with the endorsement of the marshal, 'Executed, J. M. McCalla;' to quash the return the defendant's attorney entered the following grounds, (here copy them,) on which the marshal moved the court to amend his return, which motion the court granted, and the return amended as followeth, 'by delivering a true copy of the within rule to R. Wickliffe, Esq., attorney of Smith, by direction of Tho. Triplett, attorney for Trabue,' to which amendment the defendant's counsel objected. The plaintiffs in the motion introduced a witness, Henry Easton, who proved that they, the plaintiffs, were the children of James Trabue, deceased, and then read the following records and habere facias possessionem, (here copy the papers read in evidence,) and then called on Hiram Bryant, who deposed, that at a time not named by the witness, but which appeared to be before the service of the declaration in ejectment, *James* Trabue, the father of the plaintiffs, called at his father, William Bryant's, who then lived upon the land, and as he understood from his father, had settled there under Nathaniel Hart. That the said Trabue told his father, if he would rent of him he would make it easy, and that his doing so would induce others to rent of him; said witness said that his father agreed to do so, and recollects that his father paid Trabue, as rent,

a shot gun worth about ten dollars. That after Smith, the defendant in the motion, obtained judgment, his father went off and left him, the witness, on the land; and that he, the witness, agreed to let Samuel Plummer have the place, but that, when Plummer came to take possession, a man by the name of Rose, who alleged that he had rented or bought of Trabue, took up a swingle tree, and threatened to knock his brains out unless he left the premises; that Plummer left the land; that when his, the witnesses father, left the premises, he left him in the house he occupied, without any thing said as to whose tenant he was; that afterwards he moved off to Missouri, and within a few years returned; that he understood that James Trabue sold the tenement, occupied by Evans, to his brother Jeremiah Bryant, and that J. Bryant has rented to said Evans, who was occupying the place when the marshal and Plummer turned Evans out of possession. That Samuel Smith lived in the State of Maryland, was known to the court, and not controverted by the plaintiffs' counsel.

This being all the evidence and grounds for the motion, the defendant by his counsel, R. Wickliffe, in the action of ejectment, objected to the motion, first, because this court has no jurisdiction to hear and determine the matter between the plaintiffs and Samuel Smith, a citizen of Maryland, and not served with process in this district. 2d. That the service of the process on R. Wickliffe was not sufficient, he having only been counsel in the causes read, (for Smith,) and having no other agency for Smith whatever, and the return of the marshal showing and proving that Smith had an agent, Samuel Plummer, residing in the State. 3rd. Because neither the plaintiff or persons moving, nor their alleged ancestors, were party to the record, and therefore could not, in their names, make the motion in this court.

3*rd*. That the witness, Bryant, was an incompetent witness, if he was, as was alleged, the tenant of Trabue when Smith brought his ejectment and obtained his judgment; and if he was himself competent as a witness, then what he swore was incompetent or not sufficient.

4th. Because the plaintiff, in the motion, having shewn no title or right whatever, other than that spoken of by the witness, that the court ought not to sustain the motion. 4*th*. If the wrong complained of had been committed on Evans, that Evans or his landlord were necessary parties, before the court could hear and decide upon the motion; but the court overruled the objections of the defendant, by his counsel aforesaid, and ordered the plaintiffs in the motion to be put into the possession of

land; to which opinion and judgment of the court in overruling the objections of the defendant's counsel, and in awarding possession to be delivered to plaintiffs in the motion, defendant excepts, &c.

JOHN McLEAN, [SEAL.]
JOHN BOYLE. [SEAL.]"

The following is a copy of the record and writ of possession, referred to in the foregoing bill of exceptions, (it being the only record used on the trial,) to wit:

"Pleas before the Honorable Thomas Todd and Robert Trimble, judges of the seventh circuit court of the United States of America, in and for the district of Kentucky, held at the capitol, in the town of Frankfort, at the May term of said court, in the year 1818.

Be it remembered, that heretofore, to wit, on the 8th day of May, 1816, came John Doe, on the demise of Samuel Smith, by his attorney, into the

clerk's office of the court aforesaid, and then and there filed the following declaration in ejectment against Richard Roe, (i. e.) Jacob Brinegar, William Bryant, jr., Hiram Bryant, &c., to wit:

UNITED STATES OF AMERICA,

*Circuit court of the United States, Kentucky district, to wit:*

John Doe, a citizen of the State of Maryland, complains of Richard Roe, a citizen of the State of Kentucky, in custody, &c., of a plea of trespass and ejectment. For this, that Samuel Smith, a citizen of the State of Maryland aforesaid, in the year 1815, in the State of Kentucky, and county of Estill, had granted, demised, and to farm let, to the said John Doe messuage and farm, and containing twenty-five hundred acres of land, with the appurtenances, lying and being in the county and State aforesaid; to have and to hold the tenement aforesaid, with the appurtenances, unto the said John Doe and his assigns, from the 1st day of January aforesaid unto the full end and term of twenty years thence next following, and fully to be complete and ended; by virtue of which demise, the said John Doe into the tenement aforesaid, with the appurtenances, entered, and was thereof possessed, until the said Richard Roe, afterwards to wit, the second day of January, in the year aforesaid, with force and arms into the tenement aforesaid, with the appurtenances, in and upon the possession of him the said John Doe entered; and the said John Doe from his tenement aforesaid, (his term aforesaid not being then nor yet ended,) ejected, expelled, and amoved, and him from his possession aforesaid held out, and still doth hold out, and other enormities then and there offered him, against the peace and dignity of the United States, and to the damage of the said plaintiff $500, and therefore he brings suit, &c.

WICKLIFFE.

Mr. Jacob Brinegar, William Bryant, jr., Hiram Bryant, Esquire Wilcox, Elijah Wilcox, *a* citizen of the State of Kentucky: You may perceive by the foregoing declaration in ejectment, that I am sued for the premises therein mentioned, they being, or some part of them, in your possession, and to which I have no title; if therefore you claim any thereto, and intend to defend it, you must appear the 3d day of the next May term of the court of the United States, to be holden in and for the seventh circuit and Kentucky district, and then and there, by a rule of said court, make your defence, otherwise I shall suffer judgment to pass against me by default, and you will be turned out of possession.

Yours, &c.,

RICHARD ROE,
*A citizen of the State of Kentucky.*

Dec. 11, 1815.

*Estill county, sct.*

This day came Charles C. Krimbes, and made oath before me, Bennet Clarke, a justice of the peace for said county, that on the 16th day of this instant, 1815, he delivered a true copy to the above named gentlemen, Jacob Brinegar, William Bryant, Hiram Bryant, Esquire Wilcox, Elijah Wilcox, the tenants in possession, a copy of the above declaration and no-

tice, and informed them of the purport thereof, and that, unless they defend the suit, they will be turned out of possession.

Given under my hand, this 18th day of December, 1815.

BENNETT CLARKE, *J. P. F. C.*

And afterwards, to wit, at the November term of the court aforesaid, in the year 1816, came the plaintiff aforesaid, by his attorney, and it appearing to the satisfaction of the court, that the tenants in possession have been regularly served with a copy of the plaintiff's declaration in ejectment, and notice thereon written, and they failing to appear and plead to the plaintiff's said action; it is therefore considered by the court, that unless they appear here on the first day of our May term next, and cause themselves to be made defendants herein, receive a declaration in a plea of trespass and ejectment, confess the lease, entry, and ouster therein supposed, and plead thereto, or, on failure thereof, judgment will be entered against Richard Roe, the casual ejector, and the writ of habere facias possessionem will be awarded the plaintiff.

And it is further ordered, that the surveyor of county do go on the lands in controversy between the parties, on the day of next, if fair, if not, on the next fair day, and then and there survey and lay off the same as either party may direct, having due regard to all deeds and other evidence that may be produced, report all matters of fact specially, and return one fair plat and certificate thereof into the clerk's office of this court thirty days at least before the day of trial; and the marshal, or one of his deputies, is directed to attend the said surveyor, to remove force should any be offered.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1817, (until which time this cause was continued,) came the plaintiff aforesaid, by his attorney, and, it appearing to the satisfaction of the court, that the tenants in possession have been regularly served with a copy of the plaintiff's declaration and notice, and they failing to appear and plead to the plaintiff's said action, though solemnly called, came not, but made default: it is therefore considered, that unless they appear here on the first day of the next term of this court, and cause themselves to be made defendants, receive a declaration in a plea of trespass and ejectment, confess the lease, entry, and ouster therein supposed, and plead thereto, or, on failure thereof, judgment will be entered against the casual ejector, and the writ of habere facias possessionem will be awarded the plaintiff.

And afterwards, to wit, at the November term of the court aforesaid, in the year 1817, came the plaintiff aforesaid, by his attorney, and it appearing to the satisfaction of the court that the tenants in possession have been regularly served with a copy of the plaintiff's declaration and notice, and they failing to appear and plead to the plaintiff's said action, though solemnly called, came not, but made default, it is therefore ordered, that unless they appear here on the first day of the next term of this court, and cause themselves to be made defendants, receive a declaration in a plea of trespass and ejectment, confess the lease entry and ouster therein supposed, and plead thereto, or, on failure thereof, judgment will be entered against the casual ejector, and the writ of habere facias possessionem awarded the plaintiff.

And at a subsequent day of the term aforesaid, to wit, the November term, 1817, came the tenants aforesaid, by their attorney, and, on his motion, it is ordered, that the common order entered up herein be set aside, and that they be admitted defendants herein instead of the casual ejector.

Whereupon, the said defendants entered into the common rule to confess the lease, entry, and ouster, and say that they are in no wise guilty of the trespass and ejectment, as the plaintiff against them has declared, and of this they put themselves upon the country, and the plaintiff likewise; therefore let a jury come here, &c.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1818, (until which time this cause was continued,) came the parties aforesaid, by their attorneys, and thereupon came a jury, to wit, James Parks, Thomas Lewis, Daniel McIlvoy, Tho. Bryan, John Beigler, James Davis, Nathaniel Hart, Thomas Y. Bryant, Daniel Fairley, Andrew McKnight, Richard Fox, and Nicholas Sneed, who being elected, tried, and sworn, well and truly to try the issue joined, upon their oaths do say: "We of the jury find the defendant guilty of the trespass in the declaration of ejectment mentioned, and do assess the plaintiff's damage to one cent."

It is therefore considered by the court, that the plaintiff recover against the said defendants his term yet to come and unexpired, of, in, and to the land and premises in his declaration mentioned, together with the damages aforesaid by the jury in their verdict aforesaid assessed, and also his costs in this behalf expended; and the defendants in mercy, &c.

And the writ of habere facias possessionem is awarded the plaintiff.

And at a subsequent day of the term last aforesaid, to wit, the May term, 1818, came the parties aforesaid, by their attorneys, and the defendants moved the court to grant a new trial herein, upon the following grounds: 1st. The verdict was contrary to law and the evidence in the cause. 2d. The verdict should have been for one moiety, instead of the whole of the land in controversy; which motion is ordered to be continued until the next motion day.

And afterwards, to wit, on a subsequent day of the term last aforesaid, to wit, the May term, 1818, came the parties aforesaid, by their attorneys, and the defendants, by their attorney, with the leave of the court, assign the following additional causes for a new trial, to wit: 1st. That the verdict was obtained by surprise; 2d. They have discovered new and important testimony, tending to impeach the credit and competency of Samuel Plummer, the material and solitary witness examined on the part of the plaintiff to prove the boundary of his claim.

And afterwards, to wit, at the November term of the court aforesaid, in the year 1818, (until which time this cause was continued,) the court being now sufficiently advised of, and concerning, the defendants' motion for a new trial herein, do order that the same be overruled, and, by consent of the parties, execution of the judgment is stayed until March next.

And afterwards, to wit, on a subsequent day of the term aforesaid, to wit, the November term, 1818, came the plaintiff, by his attorney, and Jacob Brinegar, Esq. Wilcox, and Elijah Wilcox, the tenants in possession, and David Hagan, by their attorney; and, on his motion, they are admitted defendants in the room of the casual ejector, that they will immediately appear to the plaintiff's action, receive a declaration in a plea of trespass and ejectment, confess the lease, entry, and ouster therein supposed, and plead thereto, and agree to insist upon the title only at the trial; and it is further ordered, that if, upon the trial of the issue, a verdict should be given for the defendants, or the plaintiff should not further prosecute for any other cause than the not confessing the lease, entry, and ouster, that then the lessor of the plaintiff shall pay the costs of this prosecution, if the plaintiff himself

does not pay them. Whereupon the said defendants, by their attorney, confess the lease, entry, and ouster in the declaration supposed, and agree to insist upon the title only at the trial; and say that they are in no wise guilty of the trespass and ejectment as the plaintiff against them has declared, and of this they put themselves upon the country, and the plaintiff likewise; therefore let a jury come here, &c. Whereupon came a jury, to wit, Herman Bowmar, Harry Watkyns, And. F. Price, Preston Hampton, James W. Waller, Moses Scott, Joseph Craig, John Beagles, William Kendall, John Kinnedy, Allen May, and Henry Blount, who being elected, tried, and sworn, well and truly to try the issue joined, by consent of parties the jury is adjourned over until to-morrow, and this cause is continued accordingly.

And, at a subsequent day of the term aforesaid, to wit, the November term, 1818, came the parties aforesaid, by their attorneys, and the jury adjourned over on yesterday, appeared according to adjournment, and upon their oaths do say, that the defendants are guilty of the trespass and ejectment in the declaration mentioned, as to one undivided moiety of the tenement and premises in the said declaration mentioned, and assess the plaintiff's damages to one cent.

It is therefore considered by the court, that the plaintiff recover of the said defendant, his term yet to come and unexpired, of, in, and to one equal and undivided moiety of the tenement, with the appurtenances, in the declaration mentioned, and one cent, the damages by the jury in their verdict aforesaid assessed, and also his costs by him about his suit in this behalf expended; and the said defendants in mercy, &c. And the writ of habere facias possessionem is awarded the plaintiff, returnable here, &c.

And upon the motion of the defendants, it is ordered, that Thomas Campbell, James Kincaid, Jones Hoy, Joseph Brandenburg, Samuel Brandenburg, Samuel Price, and Lewis Moore, be, and they are hereby, appointed commissioners, under the occupying claimant law, to ascertain the rents and improvements, &c.; and they are hereby ordered to make reports under each law of 1797 and 1812, and make return thereof to the next term of this court, subject to any exception, on the coming in of the report, to the right of the defendants to have their improvements valued under the occupying claimant law.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the November term, 1818, the following order was made herein, as to the defendants William Bryant and Hiram Bryant.

On motion of the defendants, and with the assent of the plaintiff's attorney, the judgment entered up herein at the last term is amended in this, "that the plaintiff recover of the defendant one moiety of the land in the declaration mentioned."

And, on the motion of the said defendant, it is ordered, that Thomas Campbell, James Kincaid, Jones Hoy, Joseph Brandenburg, Samuel Brandenburg, Moses Price, and Lewis Moore, or any five of them, be, and they are hereby appointed commissioners, under the occupying claimant law, to ascertain the rents, improvements, &c., and they are hereby ordered to make reports under each law of 1797 and 1812, and make return thereof to the next term of this court.

By consent of parties, this order is not to stay writ of possession after the first of March next.